Subject Index

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statutes involved	2
Statement	3
Argument	8
I. The trial court issued its order upon a clear and present danger that pretrial publicity would prevent a fair trial by an impartial jury	10
II. The trial court's duty to insure a fair trial for all parties compelled it to issue a pretrial publicity order authorized by Sheppard v. Maxwell	17
III. The order is not unconstitutionally vague	22
IV. The pretrial publicity order is not unconstitutionally overbroad	27
Conclusion	29

Table of Authorities Cited

Cases	Pages
Bridges v. California, 314 U.S. 252 (1941)	9, 12, 14, 20
Connally v. General Constr. Co., 269 U.S. 385 (1926)	22
Cox v. State, 238 A.2d 157 (Md. 1968)	18
Craig v. Harney, 331 U.S. 367 (1947)	9, 11, 14
Crosswhite v. Municipal Court, 260 Cal.App.2d 428 (1968)	11
Dennis v. United States, 341 U.S. 494 (1951)	25, 26
Dombrowski v. Pfister, 380 U.S. 479 (1965)	21, 22, 25
Hamilton v. Municipal Court, 270 A.C.A. 885 (1969)	11, 13, 14, 15, 27
Hayes v. Missouri, 120 U.S. 68 (1887)	18
Kelly v. Mahoney, 185 Cal.App.2d 799 (1960)	22
Kirstowsky v. Superior Court, 143 Cal.App.2d 745 (1956)	18
Lanzetta v. New Jersey, 306 U.S. 451 (1939)	22
Maryland v. Baltimore Radio Show, 338 U.S. 912 (1950)	9
Nash v. United States, 229 U.S. 373 (1913)	22

Pages

Pennekamp v. Florida, 328 U.S. 331 (1946) 9, 13

Rideau v. Louisiana, 373 U.S. 723 (1963) 12

Screws v. United States, 325 U.S. 91 (1945) 25

Sheppard v. Maxwell, 384 U.S. 333 (1966) .....passim

Singer v. United States, 380 U.S. 24 (1965) 18

Snyder v. Massachusetts, 291 U.S. 97 (1934) 17

State v. Kavanaugh, 243 A.2d 225 (1968) 16, 17

State v. Van Duyne, 204 A.2d 841 (New Jersey 1964) 19

Swain v. Alabama, 380 U.S. 202 (1965) 18

Thornhill v. Alabama, 310 U.S. 88 (1940) 25

United States v. Kobli, 172 F.2d 919 (3d Cir. 1949) 18

United States v. Tijerina, 412 F.2d 661 (10th Cir. 1969); 38 U.S.L.W. 3078 .....13, 16, 17, 23

Williams v. United States, 341 U.S. 97 (1951) 25

Wood v. Georgia, 370 U.S. 375 (1962) 9, 12

Codes

California Penal Code:

Section 166(4) 2, 7

Section 372 3

Section 602(1) 3

Section 995 23

United States Code:

Section 1257(3), Title 28 2

Constitutions

United States Constitution:

First Amendment 2, 8

Fourteenth Amendment 2

Texts

Amsterdam, Void-For-Vagueness Doctrine in the Supreme Court, 109 U.Pa.L.Rev. 67, 96 (1960) 25

Bentham, Rationale of Judicial Evidence (1827), vol. 1, pp. 573-77 18

4 U.C.L.A. L.Rev. 475, 477 (1956-57) 18

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1969

No. 464

STEVEN HAMILTON, MICHAEL SMITH, STEWART ALPERT, and JERRY RUBIN,
Petitioners,

vs.

THE MUNICIPAL COURT FOR THE BERKELEY-ALBANY JUDICIAL DISTRICT,
Respondent,

THE PEOPLE OF THE STATE OF CALIFORNIA,
Real Party in Interest.

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Court of Appeal of the State of California, First Appellate District, Division Three, is reported in 270 A.C.A. 885 (1969). This opinion is appended as Exhibit "A" to the Petition for Writ of Certiorari.

On May 14, 1969, the California Supreme Court denied petitioner's application for a hearing without opinion.

JURISDICTION

The jurisdiction of this Court is invoked under Title 28, United States Code, section 1257(3).

QUESTIONS PRESENTED

1. Whether in discharging the duty to insure a fair trial imposed by *Sheppard v. Maxwell*, 384 U.S. 333 (1966), a trial judge may, constitutionally, issue a pretrial publicity order directing the accused and accuser alike to refrain from making public statements concerning issues likely to arise at trial within the month preceding trial?

2. Whether the state appellate court applied the "clear and present danger" test in concluding that the trial court's pretrial publicity order was necessary to safeguard the parties' rights to a fair trial by an impartial jury?

3. Whether the trial court's pretrial publicity order was unconstitutionally vague and overbroad?

STATUTES INVOLVED

The First and Fourteenth Amendments to the United States Constitution.

California Penal Code section 166(4):

> "Every person guilty of any contempt of Court, of either of the following kinds, is guilty of a misdemeanor:
>
> ". . . .

"4. Willful disobedience of any process or order lawfully issued by any Court;"

STATEMENT

By a complaint filed on November 30, 1966, in the Municipal Court for the Berkeley-Albany Judicial District, petitioners were accused of violating Penal Code section 372, committing a public nuisance, and section 602(1), unlawful occupation of real property or structures (CT 24). These misdemeanor charges grew out of a much publicized demonstration on the campus of the University of California at Berkeley, protesting the presence of recruiters for the armed services of the United States.

A pretrial hearing was held on December 16, 1966. In order to secure a fair trial for all parties, and after discussion with the prosecutor and defense counsel, in petitioners' presence, the court entered its order, providing in pertinent part as follows:

"Pretrial Publicity

"To assure a fair trial in this case it is essential to keep pre-trial publicity to an absolute minimum. Therefore, and in accordance with the discussion between the court and counsel in the presence of the defendants in open court this day,

"A. The parties shall not, directly or indirectly, release to any news media information or opinion concerning the trial or any issue likely to be involved therein, other than the date and place of trial, the names of the parties and coun-

sel, the contents of the complaint, and the plea of defendants. Specifically, and without limitation, there shall be no public statements or releases concerning the merits of the complaint, the evidence or arguments to be adduced by either side, or trial tactics or strategy.

"B. This order shall apply *inter alia* to the parties and their counsel, to all law enforcement agencies, to the regents of the University of California and their agents and employees, and to the Associated Students of the University of California, their members and affiliated organizations.

"The Court recognizes the difficulties inherent in framing any order in this matter and expects the full cooperation of the parties and their counsel in carrying out the letter and the spirit of this order. The Court will entertain motions for any further orders that may be necessary or desirable in this matter." (CT 28).

Trial was set for Monday, January 16, 1967 (CT 37). On the preceding Friday, January 13, in front of the Berkeley-Albany Courthouse, where their trial was to take place, petitioners held a press conference. They issued "FOR IMMEDIATE RELEASE" this statement:

"We have decided to speak to the Press for the following reasons:

"1. The gag rule comes after the University, Sacramento, and powerful interests in the State have prejudiced people against us.

"2. We cannot accept the precedent of a gag rule against the defense in political trials where it would be especially prejudicial because the

prosecution always attempts to hide political activities behind legal language.

"3. We were arrested as scapegoats in a constitutionally protected political demonstration—arrested not because of what we did that day, but because we have all been active in effective movements against the war, University autocracy, and racism.

"The reason for this press conference is that we are making an attempt to ensure ourselves a fair and public trial. A recent ruling by the Supreme Court reversed the conviction of Sam Sheppard on the basis that pre-trial publicity on the part of the prosecution made it impossible for Sheppard to get a fair trial. It was felt that the jury had to be prejudiced against Sheppard.

"Judge Brunn, in ordering both the prosecution and the defense to desist from participating in pre-trial publicity, was we feel acting sincerely in an attempt to guarantee us a fair trial. But the effect of his ruling is the reverse. The harm against us is already done; the jury has already been prejudiced. The University, both governors, and hostile elements in the community have already given to the people of California a false view of what occurred. We have been publicly branded a small group of outside agitators who planned in advance and then provoked the events which culminated in the student strike. If this is the only view that the public is allowed to hear, how could a jury help but be prejudiced? We must speak to the press. We must give the people of the State of California our view of the events. This will not guarantee a fair trial, but it will at least make one more possible.

"Nobody planned in advance the sit-in that occurred. The University had in the past permitted picketing of military tables. How could we have known that they would tear up picket signs this time? How could we have known that, when a football player would strike a protestor, the University police would arrest the person struck and not the assailant? It was events such as these that provoked the sit-in, by their nature, they could not be planned in advance.

"As to the sit-in itself, some of those arrested did play a leading role in it. However, some played no role. There were also many students in leadership positions. None of these were arrested. The reason we were singled out is that we have in the past participated in activities on the Campus that the University disapproved of and found embarrassing, such as Vietnam Day and Black Power Day. This is, then, clearly a case of political persecution.

"As to our rights to be active politically on the Campus, we feel that these are fully protected by the Constitution. The right of free political expression and association are supposed to be the inalienable rights of all citizens. When we enter the Campus of the University of California, we do not surrender our citizenship. It is therefore unconstitutional to demand that we surrender our political rights. Some of the most significant political events in the country have occurred at the University of California. We believe we have not only a legal right but also a moral duty to participate in them." (CT 25-26; Petitioners' Exhibit D).

On the day petitioners held their press conference, they were charged with statutory criminal contempt, in violation of Penal Code section 166(4) (CT 27). That section makes "willful disobedience of any process or order lawfully issued by any Court" a misdemeanor.

On January 16, 1967, petitioners were tried and convicted on the original charges.

On March 1, 1967, petitioners demurred to the contempt complaint (CT 30). Their demurrer was overruled on March 27, 1967 (CT 34). Petitioners next applied to the Superior Court of Alameda County for an alternative writ of prohibition staying their trial for contempt (CT 1-5). The alternative writ was issued on June 19, 1967 (CT 17-18). The matter came on for hearing and on August 25, 1967, final judgment was entered denying the petition for a peremptory writ of prohibition, the alternative writ being discharged (CT 42-43).

On March 20, 1969, the Court of Appeal of the State of California, First Appellate District, Division Three, affirmed the judgment of the Superior Court. Petitioners' Exhibit A. On May 14, 1969, the California Supreme Court denied petitioners' application for a hearing without opinion. Petitioners' Exhibit B. A petition for a writ of certiorari was filed in this Court on August 12, 1969.

ARGUMENT

Petitioners urge this Court to disapprove the pretrial publicity order issued below on the ground that it unduly restricted their constitutional right to discuss publicly the political and social implications of their participation in a civil disturbance giving rise to criminal charges against them. Petitioners apparently would have the Court believe that they violated the order so as to enlighten the public on pressing social issues and to vindicate their First Amendment rights.

We perceive an altogether different purpose. When, virtually on the eve of trial, petitioners deliberately defied the trial court's injunction, they made their purpose clear:

> "1. The gag rule comes after the University, Sacramento, and powerful interests in the State have already prejudiced people against us.
>
> ". . . .
>
> "The reason for this press conference is that we are making an attempt to insure ourselves a fair and public trial. . . .
>
> ". . . The harm against us is already done; the jury has already been prejudiced. The University, both governors, and hostile elements in the community have already given to the people of California a false view of what occurred. . . ; We must speak to the press. We must give the people of the State of California our view of the events. This will not guarantee a fair trial, but it will at least make one more possible." Petitioners' Exhibit D, xv-xvi.

Petitioners were equally candid in their appeal to the state court:

> "[A]ppellants' statement constitutes an attempt to redress what appellants believe to be an imbalance in the press coverage of the events at the university." Appellants' Opening Brief in Court of Appeal, 14.

Petitioners now justify their "brazenly flagrant flouting of an order obviously made for their own protection"[1] by arguments which debilitate *Sheppard v. Maxwell, supra.* Until *Sheppard,* this Court struggled vainly to resolve the apparent conflict between the rights of fair trial and free expression. *Bridges v. California,* 314 U.S. 252 (1941); *Pennekamp v. Florida,* 328 U.S. 331 (1946); *Craig v. Harney,* 331 U.S. 367 (1947); *Maryland v. Baltimore Radio Show,* 338 U.S. 912 (1950); *Wood v. Georgia,* 370 U.S. 375 (1962). By applying the "clear and present danger" test in *Bridges, Pennekamp,* and *Craig,* the Court effectively removed contempt as a means of controlling the communications media. It was generally believed that those decisions brought into irreconcilable conflict the guarantees of the First and Sixth Amendments, free speech and free press and fair trial.

Sheppard brought a new approach and a new hope: preservation of both free press and fair trial by specific limited judicial restrictions upon speech. The Court showed that the free press-fair trial dilemma

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[1]Petitioners' Exhibit A, ix.

is not an unavoidable conflict to be resolved only by preferring one right to the other; it is a potential conflict avoidable by application of procedural devices, including pretrial publicity orders. In effect, the Court acted to interrupt temporarily the media's sources of prejudicial information, impliedly finding a constitutional difference between broadly silencing the press through the unfocused threat of contempt and carefully limiting its information sources.

We urge this Court not to retreat from *Sheppard*, but to entrust to the judiciary, the traditional guardian of First Amendment liberties, the task of securing a fair trial to accused and accuser by issuing pretrial publicity orders when it appears that the Sixth Amendment right otherwise might be lost. Some, mindful of *Bridges* and its progeny, doubt that *Sheppard* means what it says.[2] Denial of the instant petition would bolster their confidence in *Sheppard*.

I

THE TRIAL COURT ISSUED ITS ORDER UPON A CLEAR AND PRESENT DANGER THAT PRETRIAL PUBLICITY WOULD PREVENT A FAIR TRIAL BY AN IMPARTIAL JURY.

Petitioners first contend that the pretrial publicity order constitutes a prior restraint on speech made by the trial court without regard for the "clear and present danger" test. Petition, 14. This error, they argue, was compounded in the appellate court, which emasculated the Holmes-Brandeis formula by find-

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[2]See, *e.g.*, Petitioners' Exhibit A, ix.

ing it satisfied by "the mere existence of public controversy or publicity concerning the criminally accused and their conduct." Petition, 18, 30.

We disagree. Petitioners lodged with the appellate court some 87 newspaper articles concerning the petitioners, their impending trial, and the events giving rise to the charges against them. In this material, the appellate court found evidence adequate to support the implied finding of the trial court that continued pretrial publicity posed a "clear and present danger" to a fair trial.

> "[T]he evil the trial court sought to prevent by its order was the denial of a fair trial to all parties by harmful and prejudicial publicity generated by those involved in the proceedings then before the court. The imminence of the danger which the court sought to foreclose is clear." *Hamilton v. Municipal Court, supra,* 889.

Indeed, the appellate court applied the "clear and present danger" standard notwithstanding our opposition. Given the procedural safeguards built into a criminal trial, particularly the opportunity to *voir dire* prospective jurors, we emphasized that an accused or his accuser rarely could demonstrate that prejudicial publicity *immediately imperiled* a fair trial. *Cf. Craig v. Harney,* 331 U.S. 367 (1947). One seeking the protection of a judicial order would be forced to wait until the anticipated injury was inflicted. See *Crosswhite v. Municipal Court,* 260 Cal.App.2d 428 (1968). If *actual* prejudice remained the standard for reversal in prejudicial publicity cases, the "clear

and present danger" test, as customarily verbalized, would be perfectly workable. In *Rideau v. Louisiana*, 373 U.S. 723 (1963), however, this Court rejected actual prejudice as the exclusive test. An accused now need show only *inherent* prejudice. That is, given massive, pervasive and prejudicial publicity, partiality will be presumed despite juror's claims of fair-mindedness. *Sheppard v. Maxwell, supra.* The standard of reversal in publicity cases is now far more sensitive than is the "clear and present danger" test. To protect defendants against wrongful conviction, and to safeguard the people's one and only opportunity for a fair trial, the standard for protection against prejudicial publicity, we reasoned, should be made to conform with the standard for reversal. A pretrial publicity order would be proper if the trial court reasonably concluded that there otherwise existed a *substantial likelihood* that pretrial publicity would interfere with the separate rights of accused and accuser to a fair trial by an impartial jury.

We pointed out that none of this Court's decisions applying the "clear and present danger" test in contempt cases involved a jury trial. "[T]he limitations on free speech assume a different proportion when expression is directed toward a trial. . . ." *Wood v. Georgia, supra,* 390. *Bridges, Pennekamp,* and *Craig* did not involve a statutory contempt or willful disobedience of a judicial order. Each of those cases did involve the "unfocused threat" of the contempt power, *Bridges v. California, supra,* 269, applicable not only to the parties but to the press. By way of

contrast, this case involves a narrowly restricted threat of contempt, limited to the parties and excluding the press. Further, those to whom the order is directed are not made to guess at what is forbidden; they are told what is temporarily prohibited. We objected that the "clear and present danger" test imposed a tyranny of labels. Words—"clear," "present," "immediate," "peril,"—cannot substitute for a weighing of competing interests. Our position was well articulated in *Pennekamp v. Florida, supra,* at 336:

> "Whether the threat to the impartial and orderly administration of justice must be a clear and present or a grave and immediate danger, a real and substantial threat, one which is close and direct or one which disturbs the court's sense of fairness depends upon a choice of words. Under any one of the phrases, reviewing courts are brought in cases of this type to appraise the comment on a balance between the desirability of free discussion and the necessity for fair adjudication, free from interruption of its processes."

Our view gained the approval of the United States Court of Appeals for the Tenth Circuit, in *United States v. Tijerina,* 412 F.2d 661 (10th Cir. 1969),[3] decided after *Hamilton*. In affirming a contempt conviction for violation of a pretrial publicity order by criminal defendants, the Court of Appeals rejected the contention that such an order could be entered only if pretrial publicity posed a "clear and present danger" to a fair trial.

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[3]Petition for Writ of Certiorari filed on August 11, 1969. 38 U.S.L.W. 3078.

> "The order is based on a 'reasonable likelihood' of prejudicial news which would make difficult the impaneling of an impartial jury and tend to prevent a fair trial. We believe that reasonable likelihood suffices." 412 F.2d at 666.

The California Court of Appeal, however, adhered to the "clear and present danger" standard as formulated in *Bridges v. California, supra,* at 263:

> "What finally emerges from the 'clear and present danger' cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished." *Hamilton v. Municipal Court, supra,* at 889.

The substantive evil which the trial court sought to prevent was extremely serious. The People have no recourse from an unfair trial by a prejudiced and partial jury. An accused has but one: reversal and retrial. "[R]eversals are but palliatives . . . ," however, "the cure lies in those remedial measures that will prevent the prejudice at its inception." *Sheppard v. Maxwell, supra,* at 363. Mr. Justice Jackson, dissenting in *Craig v. Harney, supra,* at 394-95, observed that:

> "The right of the people to have a free press is a vital one, but so is the right to have a calm and fair trial free from outside pressures and influences. Every other right, including the right of a free press itself, may depend on the ability to get a prejudicial hearing as dispassionate and impartial as the weakness inherent in men will permit."

The probability that several of the enjoined parties would issue statements containing prejudicial material was high; the probability that petitioners would attempt to influence community opinion approached certainty. On December 14, 1966, the Berkeley Daily Gazette reported that upon entering not guilty pleas the day before, petitioners distributed a mimeographed statement which declared:

> "[T]he university is making us scapegoats. Our arrest is a political arrest; this will be a political trial.
>
> "There were students who were leaders in the demonstration who were not arrested, and some non-students arrested who were clearly not in the leadership of the action.
>
> "The six of us arrested have one thing in common—we are all non-students and we have been previously active in political events that have been embarrassing to the administration."[4]

The trial court's judgment that, if left unrestrained, petitioners again would attempt to prejudice the community in their favor was vindicated by the statement issued in violation of the order. In a sensational case featuring nationally known defendants represented by equally prominent counsel, where a party has made earlier efforts to mold public opinion, continued efforts may well succeed. The Court of Appeal correctly concluded that "[t]he imminence of the danger which the [trial] court sought to foreclose is clear." *Hamilton v. Municipal Court, supra,* at 889.

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[4]The quoted material appears in a newspaper article which petitioners lodged in the Court of Appeal.

The trial court's response was an order carefully tailored to meet the exigent circumstances. Petitioners' freedom of speech was restricted in a limited and temporary manner. The order was effective only from December 16 until trial, scheduled for January 17. Petitioners were restrained from speaking to the public only as to matters covered by the order. The trial court issued its order in petitioners' presence, and invited the parties to seek a clarification or modification as necessary.

Contrary to their assertion, petitioners were not "gagged" by the pretrial decree. If they sincerely believed they were victims of political persecution, petitioners could have effectively aired their grievance by seeking a writ of prohibition in the state courts or by filing a civil rights suit in the federal courts. Either legal action would guarantee publicity sufficient to satisfy even petitioners.

We have so far justified the court's order as a constitutional accommodation between the People's right to a fair trial and the petitioners' right to speak their minds. The Supreme Court of New Jersey, in *State v. Kavanaugh*, 243 A.2d 225, 231 (1968), identified another compelling interest: the public interest in the integrity of the judicial process. *Cf. United States v. Tijerina, supra,* at 666. When, on the eve of trial, a party resorts to the forum provided by the news media, he impugns the integrity of the judicial process. If pretrial restraints are placed upon the prosecution, as *Sheppard* mandates, but voluble defendants are left free to hold press conferences de-

nouncing the motives of the prosecution, the prosecution's evidence and witnesses, or commenting upon the merits of the case, the public will immediately perceive unfairness. Whether that unfairness is more apparent than real matters little. The trial court, having stilled the accuser but not the accused, will no longer be regarded as an impartial tribunal.

II

THE TRIAL COURT'S DUTY TO INSURE A FAIR TRIAL FOR ALL PARTIES COMPELLED IT TO ISSUE A PRETRIAL PUBLICITY ORDER AUTHORIZED BY SHEPPARD v. MAXWELL.

Petitioners denounced the trial court's order as a dangerous precedent for silencing government's critics by accusing them of crimes. Conceding that some judicial control may be exerted over defendants awaiting trial (Petition, 36), petitioners maintain that the trial court exceeded the mandate of *Sheppard.*

The State has a right to a fair trial. *State v. Kavanaugh, supra,* at 231. An accused may be enjoined from disseminating before trial information which by its prejudicial nature jeopardizes the public right to a fair trial. *United States v. Tijerina, supra,* at 666. "[J]ustice, though due to the accused, is due to the accuser also." *Snyder v. Massachusetts,* 291 U.S. 97, 122 (1934). A criminal defendant has no right to prejudice the community in his favor even as the prosecution and its witnesses are stilled. "[T]he system should guarantee 'not only freedom from any bias against the accused, but also from any prejudice

against his prosecution. Between him and the state the scales are to be evenly held.'" *Hayes v. Missouri*, 120 U.S. 68, 70 (1887), quoted in *Swain v. Alabama*, 380 U.S. 202, 220 (1965).[5]

In *Sheppard v. Maxwell* this Court declared:

> "The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences. Neither prosecutors, counsel for the defense, *the accused*, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function." *Id.* at 363 (emphasis supplied). See *id.* at 361.

Unlike the accused, the People may not seek a change of venue because of prejudicial publicity; unlike the accused, the People have no remedy in reversal because a defendant has prejudiced but one of twelve jurors. In controversial cases, as here, the public's right to a fair trial must rest upon the efficacy

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[5]That the public is entitled to a fair trial is implicit in decisions recognizing the public's right to a public trial. The latter right, enjoyed by accused and accuser alike, safeguards the independent interests of both in receiving a fair trial. See *Kirstowsky v. Superior Court*, 143 Cal.App.2d 745, 752 (1956); *United States v. Kobli*, 172 F.2d 919 (3d Cir. 1949); *Singer v. United States*, 380 U.S. 24, 35 (1965).

Jeremy Bentham recognized that the interest of the public in open trials is separate from the interest of the parties themselves. The public's right may not be waived even with judicial consent. "The reason is, that . . . there is a party interested (viz. the public at large) whose interest might, by means of the privacy in question, and a sort of conspiracy, more or less explicit, between the persons concerned (the judge included), be made a sacrifice." Bentham, Rationale of Judicial Evidence (1827), vol. 1, pp. 573-77. *Accord*, 4 U.C.L.A. L.Rev. 475, 477 (1956-57). And see *Cox v. State*, 238 A.2d 157, 158 (Md. 1968).

of a judicial order made effective by the sanction of contempt. No order could be effective if a defendant is left free to prejudice prospective jurors under the guise of redressing an asserted imbalance of information. A criminal defendant has other adequate protection against partial jurors including voir dire examination, change of venue, continuance, mistrial, and reversal on appeal.

The Supreme Court of New Jersey recently said of the Canons of Professional Ethics:

> "The ban on statements by the prosecutor and his aids applies as well to defense counsel. The right of the State to a fair trial cannot be impeded or diluted by out-of-court assertions by him to news media on the subject of his client's innocence."

State v. Van Duyne, 204 A.2d 841, 852 (New Jersey 1964). The Canons of Ethics do not apply to defendants personally, but the principle recognized in *Van Duyne* does.

Petitioners urge that fundamental fairness demands that they be permitted publicly to defend their reputation against criminal charges. They were afforded this opportunity when in open court they pleaded not guilty. The pretrial order expressly permits them to publicize their plea. Petitioners further had the opportunity to vindicate themselves at trial. To the extent that they conflict, the accused's interest in protecting his reputation in a manner and at a time of his own choosing must accede to the public's interest in a fair trial. Otherwise, criminal defendants could and

would, without fear of rebuttal, attack the reputation of their victims in the sensitive pretrial period.

Petitioners further contend that the order issued by the trial court prevented them from expressing publicly their opinion on the grievances underlying the demonstration on the Berkeley campus which led to the filing of the original charges against them. This contention is utterly without merit; the order does not limit such discussion. On December 17, 1966, the Berkeley Daily Gazette reported that Judge Brunn, who issued the order, said that it was not designed to halt debate on the campus. Petitioners lodged this news report with the state appellate court.

Petitioners contend that a pretrial publicity order may not be issued absent "direct proof that specified information would have a prejudicial effect on the trial if released." Then, they concede, an order limited to the material so specified could be issued if the harm could not be prevented by alternative means. Any other interpretation of *Sheppard*, they reason, would assume the overruling of *Bridges* and its progeny. Petition, 24.

Petitioners profoundly misunderstand the thrust of *Sheppard*. We have shown at the outset that *Sheppard* takes a new direction. Standards enunciated in *Bridges* for controlling the press are not the standards applicable under *Sheppard* for controlling sources of information. Contrary to petitioners' suggestion, in cases like this there are no adequate alternatives to pretrial orders. And, contrary to petitioners' view, *Sheppard* does not require direct proof that

specified information would be prejudicial if released. To do so would prevent a court from entering any effective prophylactic order and would require it throughout the pretrial period to act as censor. Trial participants will not always trouble themselves to clear each statement they wish to make with the court; nor should the court be troubled with each statement contemplated by the participants.

Petitioners fear that countless injustices must flow from an ungrudging construction of *Sheppard*. They express concern that similar orders will, by restricting the right of reply, damage defendants' reputation and thereby impair their ability to earn a living. Petition, 25. Petitioners themselves claim no such injury. This order, the *only* order before this Court, permitted petitioners to publicize their pleas. In addition, petitioners were left free to state that they could not then say more because of the pending court order. Indeed, petitioners protected their reputations by explaining their conduct to the press just three days before the trial court issued its order.

It is urged that if pretrial orders are permissible, government will silence its critics by commencing criminal proceedings against them. Petition, 25. First, *this order* had no such effect. Petitioners remained free to discuss publicly circumstances underlying University disturbances. Newspaper articles lodged by petitioners in the appellate court attest to continued public discussion of that subject. Second, federal courts provide a remedy when the State prosecutes in bad faith. See *Dombrowski v. Pfister*, 380 U.S. 479

(1965). Third, pretrial orders are entered by judges, not by prosecutors or public office holders. We are confident that the independent judiciary of this State will remain untainted by the corruption and villainy petitioners would attribute to the executive branch.

III

THE ORDER IS NOT UNCONSTITUTIONALLY VAGUE.

Petitioners contend that the Municipal Court's order is void for vagueness, that it denies procedural due process by failing to supply adequate notice of the limitations placed upon their activities. Petition, 32. "[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926). *Cf. Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939). However, " 'it is not required that a statute, to be valid, have that degree of exactness which inheres in a mathematical theorem. It is not necessary that a statute furnish detailed plans and specifications of the acts or conduct prohibited.' " *Kelly v. Mahoney*, 185 Cal.App.2d 799, 803-04 (1960). *Cf. Nash v. United States*, 229 U.S. 373, 377 (1913).

Petitioners claim to be confounded by several provisions in the pretrial order. The order commanded that "the parties shall not, directly or indirectly,

release to any news media information or opinion concerning the trial or any issue likely to be involved therein, other than the date and place of trial, the names of the parties and counsel, the contents of the complaint, and the plea of defendants."

Petitioners profess to be perplexed by the meaning of "directly or indirectly." Petition, 33. *Cf. United States v. Tijerina, supra,* at 663 n. 1. Uncommon understanding is not necessary to comprehend that "directly" means "personally," and that "indirectly" means "through other persons." Petitioners could speak out privately, but *not to others* for the purpose of republication in the press. "Information or opinion concerning the trial or any issue likely to be involved therein" encompasses discussion of legal or factual defenses. It does not forbid statements that important constitutional questions are at issue; it does restrain petitioners from arguing those defenses in the press. Similarly, the restriction on public discussion of "the merits of the complaint" restrains discussion of defenses, the quality or quantity of evidence for or against guilt, whether the complaint is based upon probable cause,[6] or the identity and credibility of witnesses. *Compare Sheppard v. Maxwell, supra,* at 361, concerning "statements concerning the merits of the case," *with United States v. Tijerina, supra,* at 663 n. 1 and 667. The prohibition against statements pertaining to "trial tactics or strategy," and "arguments" no doubt was addressed particularly to opposing coun-

[6]This could be tested by a motion pursuant to Penal Code section 995.

sel. We submit, however, that petitioners would have no less difficulty determining whether they were speaking on these subjects than would counsel. The quoted words are not terms of art.

We note that petitioners' understanding of the terms of the order must have benefitted from the discussion in the trial court recited in the order. If they were uncertain as to the scope of the order, petitioners could have requested clarification then or, as suggested in the order, at a later date. Their failure to do so confirms that the order was not vague.

The claim of vagueness is somewhat surprising. Petitioners' press release, issued in defiance of the trial court's order, proclaims:

> "We cannot accept the precedent of a gag rule. . . .
>
> "The reasons for this press conference is that we are making an attempt to insure ourselves a fair and public trial. . . .
>
> "Judge Brunn, in ordering both the prosecution and the defense to desist from participating in pretrial publicity, was we feel acting sincerely in an attempt to guarantee us a fair trial. But the effect of his ruling is the reverse. The harm against us is already done; the jury has already been prejudiced. . . . We must speak to the press. We must give the people of the State of California our view of the events."

On the eve of trial, the contemners violated the order not because they did not understand it, but because they did not like it. Their contempt was deliberate. They cannot now seek refuge in the void-for-

vagueness doctrine. "A claim of guilelessness ill becomes those with evil intent." *Dennis v. United States,* 341 U.S. 494, 515 (1951).

This Court has invoked the traditional rule of standing when a statute is attacked as void on its face. *Screws v. United States,* 325 U.S. 91 (1945); *Williams v. United States,* 341 U.S. 97 (1951); *Dennis v. United States, supra.* See Amsterdam, *Void-For-Vagueness Doctrine in the Supreme Court,* 109 U.Pa. L.Rev. 67, 96 (1960). A finding of no standing means that the challenged statute supplied adequate notice under the circumstances to the present parties and, therefore, is not vague as to all persons. Whether the statute imparts sufficient notice to any other person is a question left for a later day, although as to others the claim of vagueness appears well taken. See *Dennis v. United States, supra,* at 515-16.

Where a vagueness attack is mounted against a judicial order directed to named persons rather than against a statute addressed to the general public, strict application of the standing requirement is especially appropriate. One who intentionally defies a judicial order will not be heard to complain that the order was poorly drafted.

We recognize that the standing requirement generally is held in abeyance when the statute attacked inhibits free speech. See *Thornhill v. Alabama,* 310 U.S. 88, 97 (1940); *Dombrowski v. Pfister,* 380 U.S. 479 (1965). But this Court has applied the standing rule where a statute regulating the content of speech was challenged.

Petitioners in *Dennis v. United States, supra,* urged that the Smith Act was so unconstitutionally uncertain as to inhibit free speech. In affirming the judgment below this Court said:

> "We agreed that the standards as defined is not a neat, mathematical formulary. Like all verbalizations, it is subject to criticism on the score of indefiniteness. . . . But we are not convinced that because there may be borderline cases at some time in the future, these convictions should be reversed because of the argument that these petitioners could not know that their activities were constitutionally proscribed by the statute." *Id.* at 515-16.

Where, despite a defendant's having adequate notice, courts have declined to apply the standing requirement to vagueness attacks upon statutes narrowing freedom of expression, they have done so out of a reluctance to leave standing any law which may inhibit others in the exercise of their First Amendment freedoms. However, where the attack is upon a judicial order limited in time and limited to named parties, invoking the traditional standing requirement leaves on the books no law which chills speech throughout the community.

The method of petitioners' vagueness attack is familiar: by torturing otherwise clear language unsuspected meanings are uncovered. These hidden meanings then are offered as proof of vagueness. The standard of constitutional certainty is, however, common understanding, not uncommon ingenuity. The trial court's order is not unconstitutionally vague.

IV

THE PRETRIAL PUBLICITY ORDER IS NOT UNCONSTITUTIONALLY OVERBROAD.

Petitioners complain that the order is unconstitutionally overbroad, that it "bars comments by the defendants on almost the entire range of controversial university issues surrounding their arrest and prosecution. . . ." Petition, 29. Petitioners further criticize the order on the ground that it extends to persons whose conduct could not be regulated by the trial court.

The Court of Appeal pointed out that the order "does not prohibit the defendants from describing the charges against them and unequivocally asserting their own innocence. It does prohibit discussion of the merits of the case and the evidence and arguments that might be presented at trial, and in this respect goes no further than the permissible limits noted in *Sheppard.*" *Hamilton v. Municipal Court, supra,* at 890.

The pretrial order does not specifically prohibit discussion of the controversial issues underlying campus disturbances. The order limited comment on matters to be placed before a jury. Petitioners were free to criticize police, University officials, and others to the extent that they did not thereby publicly rehearse their trial defense. The order did not limit debate on controversial campus issues. The judge who issued the order said as much in the local press the day after the order was entered. This press report certainly did not escape petitioners' notice. Petitioners never-

theless insist that the order is so vague as to be fairly subject to that interpretation. For the reasons stated above, their vagueness attack must fail.

The pretrial order did restrain petitioners from publicly denouncing their prosecution as a political persecution. Such a statement during the pretrial period would have been highly inflammatory. The trial court's order did not completely silence petitioners on this matter, however. Three days before the order issued appellants distributed to the press a statement declaring "the University is making us scapegoats. Our arrest is a political arrest; this will be a political trial." Had they believed their own publicity releases petitioners could have sought redress in the state courts by writ of prohibition or in the federal courts under the Civil Rights Act. In light of petitioners' prior statements and available remedies, the order, while ostensibly regulating content, effectively regulated only the time, place, and manner of speech. Under the surrounding circumstances that restriction was reasonable and constitutional.

Lastly, it is argued that the overbreadth of the order is reflected in its scope. The order was directed, *inter alia,* to University regents, employees, and agents, and to the membership of the Associated Students of the University of California. Representatives from these groups had spoken out on the charges against petitioners. Had this publicity continued, the parties' opportunity for a fair trial would have been impaired. While not party to the proceedings, the above were party to the conduct which was the basis

for the criminal charges against petitioners. The Court of Appeal correctly concluded that the order properly extended to all named persons.

Assuming *arguendo* that it did not, however, the order nevertheless remained valid as to appellants. This its because the alleged invalid portion of the order is severable. Severance is easily accomplished where all parties are named. The reviewing court need not rewrite the order, but only delete those not proper parties. Severance is particularly appropriate here, for petitioners made clear that they spoke to the press not to vindicate the rights of others but to prejudice prospective jurors in their favor.

A pretrial publicity order is an *ad hoc* response to a specific situation. No two such situations are identical. We may therefore be certain, despite petitioners' claimed fears, that the order before this Court cannot serve as a precedent for overly broad orders in future cases.

CONCLUSION

For the stated reasons we respectfully urge this Court to deny the Petition for a Writ of Certiorari.

Dated, November 25, 1969.

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